Supreme Court, U.S.
FILED
JAN 10 1996
CLERK

No. 95-819

In The

Supreme Court of the United States

October Term, 1995

ROBERT PAPA,

Petitioner,

v.

NASSAU COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent.

Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of New York

REPLY TO BRIEF IN OPPOSITION

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PRELIMINARY STATEMENT

In its opposition, Nassau County erroneously contends that the constitutional issues were not properly raised below and that the New York appellate courts do not undertake a broad review of the facts. Because these contentions are erroneous, this reply brief is necessary.

ARGUMENT

A. All of the Constitutional Arguments Were Properly and Timely Raised

Petitioner recognizes the need to show that the Constitutional issues were properly and timely raised in the State court system, especially where, in a State such as New York, an appellate court may not explicitly address the claim because it deems the matter concluded by its prior precedent. *See, Street v. New York*, 394 U.S. 576, 581-585 (1969) (examining the record and determining that the federal question was properly and timely raised). The record shows proper preservation.

The question of the powers of the New York appellate courts to reverse on credibility issues *was* raised in the Appellate Division. Obviously, it cannot be raised in a trial court, because it is not a trial issue. Petitioner claimed in his *appellee's brief* in the Appellate Division that the matter involved a credibility call which was beyond the power of an appellate court to reassess, notwithstanding the substantive rule in New York, discussed below, empowering New York appellate courts to do so.

The issue of the constitutional standard for the burden of proof in this type of proceeding was determined by the Court of Appeals adversely to petitioner's position in 1985, long before the hearing began in this case. *Matter of Tammy Z.*, 66 N.Y.2d 1, 484 N.E.2d 1038, 494 N.Y.S.2d 686 (1985). The trial court, accordingly, deemed itself bound by that holding, and, of course, the point was moot because it dismissed the petition on the basis of the standard of proof permitted by New York statute and *Tammy Z. Cf. Matter of Cerbone*, 61 N.Y.2d 93, 96, 460 N.E.2d 217, 472 N.Y.S.2d 76 (1984) (issue of constitutionality of burden of proof moot where same result would obtain under either standard).

Once the Appellate Division *reversed* on the facts, petitioner made a motion for reargument and for permission to appeal to the Court of Appeals in the Appellate Division in which the Constitutional issues were explicitly argued. A copy of that motion has been filed with this Court. Inasmuch as petitioner had not been aggrieved by the unconstitutional nature of the New York system of appellate review, or the burden of proof, because Family Court had held in his favor, he first had standing to raise the Constitutional issues at that point. Thus, at that point, the issues were timely and properly raised. *See, Missouri ex rel. Missouri Ins. Co. v. Gehner*, 281 U.S. 313 (1930); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930); *cf. Saunders v. Shaw*, 244 U.S. 317 (1917).

Because the order was non-final under New York law, petitioner had to await a dispositional hearing in the Family Court before he could appeal to the Court of

Appeals following the denial of permission by the Appellate Division. Once that hearing was conducted, petitioner filed an appeal as of right, on constitutional grounds, to the New York Court of Appeals, a copy of which was served on the Attorney General as required by N.Y. Executive Law § 71, and which again sought to raise the Constitutional issues. (On both occasions, the Attorney General declined to participate.)

The Court of Appeals dismissed that appeal. New York law proceeds under the same basis as federal law: a dismissal of an appeal for want of a substantial constitutional question is a decision on the merits. *See, Matter of Capoccia*, 59 N.Y.2d 549, 553, 453 N.E.2d 497, 466 N.Y.S.2d 268 (1983); *People ex rel. Lupo v. Fay*, 13 N.Y.2d 253, 256, 196 N.E.2d 56, 246 N.Y.S.2d 399 (1963), *cert. denied*, 376 U.S. 958 (1964). A particularly good illustration of this is *Matter of David A.C.*, 43 N.Y.2d 708, 372 N.E.2d 42, 401 N.Y.S.2d 208 (1977), where the New York Court of Appeals dismissed an appeal based on a similar challenge to the State's adoption laws. This Court granted certiorari and reversed in *Caban v. Mohammed*, 441 U.S. 380 (1978).

After the petitioner's appeal was dismissed, the Court of Appeals granted permission to appeal. The issues were again raised in the Appellate brief, specifically in the event that review was sought in this Court. A copy of that brief has been filed with this Court.

Finally, if it be necessary, petitioner would make application to the New York Court of Appeals for amendment of the remittitur to show that the issues were properly raised and determined. *See, Ungar v. Sarafite*, 376 U.S. 575, 582-583 (1963).

B. New York Appellate Courts Reassess Credibility on Cold Record

In *York Mortgage Corp. v. Clotar Constr. Corp.*, 254 N.Y. 128, 133, 172 N.E. 265 (1930), the New York Court of Appeals, in light of the adoption of a new state constitution, changed the "old rule," found in cases such as *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632 (1930), and held that the New York Appellate Division has powers as broad as that of the trial court in determinations of questions of fact; it is not limited to reversing where the original findings are "clearly erroneous."

That rule is now well-established. Cohen & Karger, *Powers of the New York Court of Appeals*, § 112, at 483-484 (1952) (noting Appellate Division's power is not confined to "clearly erroneous" review, but is rather plenary). As explained in *People ex rel. MacCracken v. Miller*, 291 N.Y. 55, 62, 50 N.E.2d 542 (1943), when the "Appellate Division reviews a finding of fact its inquiry is not limited to an examination of whether the finding is supported by some credible evidence, if it appears that upon *all* the credible evidence a different finding would not have been unreasonable. Then the Appellate Division must, like the court at Special Term [the trial court sitting without a jury], weigh the probative force of conflicting testimony and the relative strength of conflicting inferences that may be drawn from the testimony."

Further, contrary to the arguments raised by the Law Guardian, this power is routinely exercised. In the two cases cited by the New York Court of Appeals in this case, *Matter of Sheila G.*, 61 N.Y.2d 368, 386, 462 N.E.2d 11, 474 N.Y.S.2d 421 (1984); *Matter of Hime Y.*, 54 N.Y.2d 282,

286, 429 N.E.2d 792, 445 N.Y.S.2d 114 (1981), the Appellate Divisions reversed on the facts. *Accord, Matter of Tiffany F.*, 205 A.D.2d 429, 613 N.Y.S.2d 631 (1st Dept. 1994). The cases cited by the law guardian by and large involved affirmances of findings made by trial courts.

The settled New York rule of appellate practice, allowing an appellate court to *reweigh* evidence and credibility findings, without hearing and seeing the witnesses, is what we submit violates due process of law.

C. Burden of Proof

It is evident that the issue of burden of proof was properly raised and is significant in this case. On no theory can the evidence be said to be clear and convincing, if that be the standard that is constitutionally required.

Even the Law Guardian is constrained to concede that the issue is one that has divided the State courts in this country, though he contends that preponderance should suffice.

CONCLUSION

Since the issues were properly and timely raised in the proceedings below, and the issues are of paramount public importance, the petition for a writ of certiorari should be granted.

Dated: January 9, 1996

Respectfully submitted,

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